

**Letter of Findings: 04-20140616
Sales and Use Tax
For the Years 2011-2013**

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

Retail Merchant, an LLC, did not maintain adequate records to demonstrate that it properly reported sales tax on sales inside its convenience store. Retail Merchant also did not maintain adequate records to demonstrate that it paid sales/use tax on its purchases to be used for its business. Thus, the Department's assessment is correct.

ISSUE

I. Sales & Use Tax - Imposition.

Authority: IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-3-1; IC § 6-2.5-3-2; IC § 6-2.5-4-1; IC § 6-2.5-9-3; IC § 6-8.1-5-1; IC § 6-8.1-5-4; Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Indiana Dept. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Scopelite v. Indiana Dept. of Local Gov't Fin., 939 N.E.2d 1138 (Ind. Tax Ct. 2010); Wendt LLP v. Indiana Dept. of State Revenue, 977 N.E.2d 480 (Ind. Tax Ct. 2012); Rhoades v. Indiana Dept. of State Revenue, 774 N.E.2d 1044 (Ind. Tax Ct. 2002); USAir, Inc. v. Indiana Dept. of State Revenue, 623 N.E.2d 466 (Ind. Tax Ct. 1993); Indiana Dept. of State Rev. v. Caterpillar, Inc., 15 N.E.3d 579 (Ind. 2014).

Taxpayer protests the assessment of additional sales tax and use tax.

II. Tax Administration - Penalty and Interest.

Authority: IC § 6-8.1-10-1; IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the assessment of negligence penalty and interest.

STATEMENT OF FACTS

Taxpayer operates a gas station and a convenience store located in Indiana. The Indiana Department of Revenue ("Department") conducted a sales/use tax audit of Taxpayer's business records for tax years 2011 through 2013.

Pursuant to the audit, the Department determined that Taxpayer sold various items, tangible personal property ("TPP"), without collecting sales tax or exemption certificates from customers who claimed that they were exempt from the sales tax. The Department's audit also determined that Taxpayer purchased certain TPP to be used in the course of its business without paying sales or use tax. As a result, the Department issued proposed assessments for additional sales and use tax, penalty, and interest.

Taxpayer protests the assessment of additional sales tax and use tax. An administrative hearing was held. This Letter of Findings ensues. Additional facts will be provided as necessary.

I. Sales & Use Tax - Imposition.

DISCUSSION

As a threshold issue, all tax assessments are prima facie evidence that the Department's claim for the unpaid tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007); Indiana Dept. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012). Thus, the taxpayer is required to

provide documentation explaining and supporting its challenge that the Department's assessment is wrong. Poorly developed and non-cogent arguments are subject to waiver. *Scopelite v. Indiana Dept. of Local Gov't Fin.*, 939 N.E.2d 1138, 1145 (Ind. Tax Ct. 2010); see also *Wendt LLP v. Indiana Dept. of State Revenue*, 977 N.E.2d 480, 486 n.9 (Ind. Tax Ct. 2012). Also, "all statutes are presumptively constitutional." *Indiana Dept. of State Rev. v. Caterpillar, Inc.*, 15 N.E.3d 579, 587 (Ind. 2014) (citing *UACC Midwest, Inc. v. Indiana Dept. of State Rev.* 629 N.E.2d 1295, 1299 (Ind. Tax Ct. 1994)). When an agency is charged with enforcing a statute, the jurisprudence defers to the agency's reasonable interpretation of that statute "over an equally reasonable interpretation by another party." *Caterpillar, Inc.*, 15 N.E.3d at 583.

The Department determined that Taxpayer, as a retail merchant, had not collected and remitted the proper amount of sales tax for the years at issue. Specifically, the Department noted that Taxpayer failed to provide complete source records for the audit. As a result, the Department was not able to verify the sales, taxable or otherwise, occurring inside Taxpayer's convenience store against the exempt sales claimed by Taxpayer in its monthly sales tax returns (ST-103MP forms). The Department also found that Taxpayer purchased several items to be used during the course of its business without paying sales tax or use tax.

Taxpayer disagreed, and protests the Department's assessment. This Letter of Findings results from that protest.

A. Sales Tax on Inside Convenience Store Sales.

Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. IC § 6-2.5-2-1(a). A person is a retail merchant making a retail transaction when he engages in selling at retail. IC § 6-2.5-4-1(a). A retail merchant - such as Taxpayer - is required to "collect the tax as [an] agent for the state." IC § 6-2.5-2-1(b). The retail merchant "holds those taxes in trust for the state and is personally liable for the payment of those taxes" IC § 6-2.5-9-3. Furthermore, "Taxpayer is required to keep books and records so that the [D]epartment can determine the amount, if any, of the person's liability for that tax by reviewing those books and records." IC § 6-8.1-5-4.

The Department determined that Taxpayer underreported taxable sales. The Department reviewed Taxpayer's Point of Sale ("POS") reports, and found that the amount of sales tax actually collected by the business was different than the amount remitted to the state. The Department requested documentation explaining the discrepancy; Taxpayer could not provide such documentation.

The Department concluded that the POS reports were unreliable for the years 2012-2013. In addition, the POS reports for 2011-2012 could not be supplied, so an average amount was calculated and used to determine sales tax due.

During the hearing, the Department again asked Taxpayer for documentation explaining the discrepancy noted in the audit and for the 2011-2012 POS reports. Taxpayer did provide some receipts; however, the documentation that Taxpayer presented does not support its argument for a reduction in the sales tax assessment. For example, several invoices appeared to be for items which were rung up as exempt including ice, milk, and groceries so no tax was calculated. Also other receipts showed that no tax was paid. Other receipts were for fuel that has no bearing on the sales tax assessment since the auditor did not use gross sales in the calculations. Finally, there were several receipts for items that were rung up as exempt for store use which should have been taxable and would have been subject to use tax (i.e. bath tissue, and/or facial tissue).

Therefore, after review, the Department is not convinced that Taxpayer's records have proved the proposed assessment incorrect. Taxpayer's documentation and analysis does not prove that the Department's adjustments to reconcile the difference between Taxpayer's reported sales and audited sales were wrong. Taxpayer has not met its burden under IC § 6-8.1-5-1(c) to prove the Department's assessment is incorrect. Therefore, Taxpayer's protest on the imposition of sales tax is denied.

B. Use Tax on Purchases of Tangible Personal Property.

Indiana imposes an excise tax called "the use tax" on "the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." IC § 6-2.5-3-2(a). "Use" means the "exercise of any right or power of ownership over tangible personal property." IC § 6-2.5-3-1(a). The use tax is functionally equivalent to the sales tax. See *Rhoades v. Indiana Dept. of State Revenue*, 774 N.E.2d 1044, 1047 (Ind. Tax Ct. 2002).

By complementing the sales tax, the use tax ensures that non-exempt retail transactions (particularly out-of-state

retail transactions) that escape sales tax liability are nevertheless taxed. *Id.*; *USAir, Inc. v. Indiana Dept. of State Revenue*, 623 N.E.2d 466, 468-69 (Ind. Tax. Ct. 1993). To trigger imposition of Indiana's use tax, tangible personal property must (as a threshold matter) be acquired in a retail transaction. *Id.*

The Department's audit determined that Taxpayer failed to pay sales tax or remit use tax on various items it purchased which were used in operating its business. During the hearing the Department asked Taxpayer to provide documents showing that use tax was paid on the items listed in the audit. Taxpayer has not provided any documentation showing that sales tax was paid at the time of purchase or that use tax was remitted to the state. Taxpayer has not met its burden under IC § 6-8.1-5-1(c); therefore, its protest on the imposition of use tax is denied.

In conclusion, Taxpayer was unable to provide documentation supporting its protest of the imposition of sales tax. Also, Taxpayer was unable to provide documentation supporting its protest of the imposition of use tax. Taxpayer has not met the burden of proving the proposed assessments incorrect as required by IC § 6-8.1-5-1(c).

FINDING

Taxpayer's protest is respectfully denied.

DISCUSSION

II. Tax Administration - Penalty and Interest.

Taxpayer asserts that the Department should abate the negligence penalty and interest imposed.

A. Interest.

Taxpayer asserts that it does not owe interest on the sales and use tax imposed. Indiana imposes interest on overdue tax pursuant to IC § 6-8.1-10-1(a), which states:

If a person fails to file a return for any of the listed taxes, fails to pay the full amount of tax shown on the person's return by the due date for the return or the payment, or incurs a deficiency upon a determination by the department, the person is subject to interest on the nonpayment.

In the case of the interest assessed, the Department has no discretion to abate or adjust the amount of interest owed. IC § 6-8.1-10-1(e). Taxpayer's request to abate interest on the Department's proposed assessment is denied.

B. Penalty.

Taxpayer requests the penalty be abated. Taxpayer maintains that penalty waiver is warranted because it has a quality compliance record with regard to other tax filings, and that the mistake made was reasonable.

IC § 6-8.1-10-2.1(a)(2) requires a ten-percent penalty if the taxpayer "fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment."

The regulation which controls the application of penalty is [45 IAC 15-11-2\(b\)](#), which states:

"Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

Generally, the Department will waive penalty in the event of an unusual error and a good compliance record. [45 IAC 15-11-2\(c\)](#) provides that:

The department shall waive the negligence penalty imposed under IC § 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in

trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

In the instant case, the auditor assessed a 10[percent] negligence penalty based on the fact the Taxpayer failed to collect and remit sales and use tax.

Taxpayer has provided sufficient information to establish that its failure to pay the deficiency in this instance was not due to Taxpayer's negligence, but was due to reasonable cause as required by [45 IAC 15-11-2\(c\)](#). In addition, Taxpayer's facts and circumstances surrounding the assessment demonstrates reasonable cause. Furthermore, Taxpayer has taken steps to ensure that this action does not occur again. Therefore, the Department sustains the Taxpayer's penalty protest.

While Taxpayer's current circumstances show that Taxpayer acted with reasonable cause, The Department takes this opportunity to notify Taxpayer that, should these circumstances arise again, penalty waiver may not be warranted.

FINDINGS

Taxpayer's penalty protest is sustained.

SUMMARY

Taxpayer's protest in Issue I relates the imposition of sales and use taxes is denied. Taxpayer's protest in Issue II is denied regarding the imposition of interest and is sustained regarding the imposition of penalty.

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